United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

OCTOBER TERM, 1910.

No. 2295

A. WEBSTER RICHARDS, APPELLANT,

vs.

WASHINGTON TERMINAL COMPANY, A CORPORATION

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED NOVEMBER 10, 1910.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1910.

No. 2248.

A. WEBSTER RICHARDS, APPELLANT,

vs.

WASHINGTON TERMINAL COMPANY, A CORPORATION, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 12, 1910.

In the Court of Appeals of the District of Columbia.

No. 2248.

A. WEBSTER RICHARDS, Appellant,
vs.
WASHINGTON TERMINAL COMPANY, a Corporation.

a Supreme Court of the District of Columbia.

Law. No. 51446.

A. WEBSTER RICHARDS, Plaintiff,
vs.
WASHINGTON TERMINAL COMPANY, a Corporation, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Declaration.*

Filed Feb. 26, 1909.

In the Supreme Court of the District of Columbia.

Law. No. 51446.

A. WEBSTER RICHARDS, Plaintiff,
vs.
WASHINGTON TERMINAL COMPANY, a Corporation, Defendant.

The plaintiff, A. Webster Richards, sues the defendant, the Washington Terminal Company, a corporation, having an office and an agent and doing business in the District of Columbia, for that the plaintiff, before and at the time of the committing of the grievances hereinafter mentioned was, and from thence hitherto has been, and still is, the owner in fee simple and in lawful possession of a certain

lot or parcel of ground, with the appurtenances, situated in the City of Washington, in the District of Columbia, on New Jersey Avenue, Southeast, between D and Ivy Streets, the said lot or parcel of ground having thereon a certain dwelling house, known as No. 415 New Jersey Avenue, Southeast, in which said dwelling house, with the appurtenances, the said plaintiff and his family, at all of the times hereinafter mentioned, inhabited and dwelt, and still do inhabit and dwell. And the said defendant, before and at the time of the committing of the grievances hereinafter mentioned, was, and from thence hitherto has been, and still is, possessed of certain railroad tracks contiguous and near to the said dwelling
2 house of the plaintiff, to wit, the distance of twenty-five (25) feet therefrom. And the plaintiff says that the said defendant, well knowing the premises, but contriving and intending to injure, prejudice and aggrieve the said plaintiff, and to diminish and destroy the value of his said property, and to incommode and annoy him and his family in the possession, use, occupation and enjoyment of his said dwelling house and premises, heretofore, to-wit, on the 1st day of March, 1906, and divers other days and at divers other times between that day and the day of the commencement of this suit, wrongfully and injuriously moved and propelled and caused to be moved and propelled, back and forth, upon, over and along said railroad tracks, so being contiguous and near to the said land and dwelling house of the plaintiff, divers locomotive steam engines and divers cars and trains of cars propelled by locomotive steam engines; and in the operation of said railroad, and in the movement back and forth of said locomotive steam engines and of said cars and trains over said railroad tracks, the said defendant, on to wit, the said 1st day of March, 1906, and on divers other days and at divers other times between that day and the day of the commencement of this suit, unlawfully, wrongfully and injuriously caused divers, noisome, noxious, and offensive vapors, fumes, odors and smells and divers large quantities of smoke, steam, cinders, soot, ashes, dust and dirt, to arise, issue, and proceed from the said tracks and from the said locomotive steam engines, trains and cars, and to enter into and spread and diffuse themselves over and upon into through and about the said land and dwelling house of the plaintiff, and over and upon the contents of said dwelling house,
3 and the air, over, through and about the said land and dwelling house of the plaintiff was thereby greatly filled and impregnated with the said noisome, noxious and offensive vapors, fumes, odors and smells and with said smoke, steam, cinders, soot, ashes, dust and dirt, and was rendered on the said several days and at the said several times aforesaid, and became and was, and still is, corrupt, offensive, unwholesome, unhealthy and uncomfortable to the intolerable discomfort, annoyance and inconvenience of the plaintiff and members of his family; and further, in the operation of said railroad, and in the movement back and forth of said locomotive steam engines and of said cars and trains over said railroad tracks, the said defendant did make or cause to be made divers loud, rumbling, jarring, agitating and offensive sounds and noises arising

from the ringing of bells attached to the said locomotive steam engines, and from the puffing and whistling of said locomotive steam engines, and from the blowing off of steam therefrom, and from the movement of said locomotive steam engines and of said trains and cars upon, over and along said railroad tracks, thereby destroying the plaintiff's peaceful and quiet enjoyment of his said dwelling house, and causing great annoyance and discomfort to the plaintiff and members of his family during the daytime and disturbing his and their repose during the night, greatly to the injury of his and their health; and further, by the operation of said railroad and in movements back and forth of said locomotive steam engines and of said cars and trains over said railroad tracks, the said defendant caused the plaintiff's said dwelling house and the land upon which the same is built as aforesaid, to greatly vibrate, shake and
4 tremble, and thereby greatly weakening and impairing the foundations of said dwelling house, and causing the walls of and plastering in the same to break and crack. Wherefore, and by reason of the premises, the plaintiff and members of his family, during all the time aforesaid, were and still are greatly annoyed and incommoded in the use, possession, occupation and enjoyment of said dwelling house and premises, and the said dwelling house has been rendered unfit and unsuitable for habitation; the health of the plaintiff and members of his family was and is greatly and permanently injured; the foundations of plaintiff's dwelling house were greatly weakened and impaired and the walls thereof and the plastering therein cracked and broken, and the said dwelling house was otherwise greatly damaged and injured; the value of said land and premises of the plaintiff was and is greatly lessened and depreciated and the rental value thereof greatly diminished; the furniture and contents of said dwelling house belonging to the plaintiff were greatly damaged, and the plaintiff has otherwise, by reason of the premises, suffered and sustained great injury and damage. Wherefore the plaintiff claims from the defendant the sum of Ten Thousand Dollars ($10,000) besides cost of suit.

G. L. BAKER,
HUGH H. OBEAR,
Attorneys for Plaintiff.

Notice to Plead.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays occurring after the
5 day of service hereof, otherwise judgment.

G. L. BAKER,
HUGH H. OBEAR,
Attorneys for Plaintiff.

Defendant's Plea.

Filed Mar. 17, 1909.

* * * * * * *

Now comes the defendant and for plea to the declaration filed in the above entitled cause says that it is not guilty as therein alleged.

GEORGE E. HAMILTON,
Attorney for Defendant.

Supreme Court of the District of Columbia.

TUESDAY, *March* 22, 1910.

Session resumed pursuant to adjournment, Chief Justice Clabaugh, presiding.

* * * * * * *

Upon motion of the plaintiff, leave is hereby granted him to file the amendment to his declaration here presented to the Court.

6 *Amendment to Declaration.*

Filed Mar. 22, 1910.

* * * * * * *

Comes now the plaintiff, A. Webster Richards, by his counsel, Gibbs L. Baker and Hugh H. Obear, and by leave of court first had and obtained, amends the declaration heretofore filed in this cause in the following particulars:

On page two of the said declaration after the words "wrongfully and injuriously moved and propelled and caused to be moved and propelled" and before the words "back and forth, upon, over and along said railroad tracks" insert the words "or allowed or permitted to be propelled"; and on page two after the words "unlawfully, wrongfully and injuriously caused" and before the words "divers, noisome, noxious and offensive vapors," etc., insert "or authorized or permitted"; and on page three of said declaration after the words "the said defendant did make or cause to be made" and before the words "divers, loud, rumbling, jarring, agitating and offensive sounds" insert the words "or allowed or permitted to be made."

GIBBS L. BAKER,
HUGH H. OBEAR,
Attorneys for Plaintiff.

Endorsed: Leave to file granted. Harry M. Clabaugh, Chief Justice.

7 *Joinder of Issue.*

Filed Mar. 22, 1909.

* * * * * * *

The plaintiff hereby joins issue with the defendant on its plea filed herein.

GIBBS L. BAKER,
HUGH H. OBEAR,
Att'ys for P't'ff.

Stipulation.

Filed Apr. 25, 1910.

* * * * * * *

It is stipulated and agreed by and between counsel for plaintiff and counsel for defendant that the plea of the defendant filed herein to the original declaration in this cause may be taken and considered as having been filed to the declaration as amended.

GIBBS L. BAKER AND
HUGH H. OBEAR,
Attorneys for Plaintiff.
HAMILTON, COLBERT, YERKES & HAMILTON,
Attorneys for Defendant.

8 Supreme Court of the District of Columbia.

TUESDAY, *May 24th,* 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice presiding.

* * * * * * *

Come again the parties hereto aforesaid in manner aforesaid and the same jury that was respited yesterday, who being given the case in charge, upon their oath say they find herein in favor of the defendant. Wherefore, it being agreed by attorneys for the respective parties herein, that judgment may be entered on said verdict forthwith it is considered, that plaintiff herein take nothing by this action, that the defendant go hereof without day, be for nothing held, and recover of plaintiff its costs of defense to be taxed by the clerk and have execution thereof.

From the foregoing judgment, the plaintiff by his attorneys in open court notes an appeal to the Court of Appeals of the District of Columbia; whereupon, the penalty of a bond for costs is fixed in the sum of One Hundred Dollars.

Memorandum.

June 13, 1910.—Appeal bond approved and filed.

9 *Order Extending Time for Settling Bill of Exceptions and Filing Transcript of Record.*

Filed Jul- 1, 1910.

* * * * * * *

Upon motion of counsel for plaintiff in the above entitled cause, and for cause shown, it is by the court this 1st day of July 1910, ordered that the time for settling the bill of exceptions and filing the transcript of record herein be and the same is hereby extended to and including the first day of September, 1910.

HARRY M. CLABAUGH,
Chief Justice of the Supreme Court of the District of Columbia.

We consent:
HAMILTON, COLBERT, YERKES & HAMILTON,
By YERKES,
Att'ys for Def't.

Order Extending Time for Settling Bill of Exceptions, etc.

Filed Aug. 12, 1910.

* * * * * * *

Upon motion of counsel for plaintiff in the above entitled cause, and for cause shown, it is, by the Court, this 12th day of
10 August, 1910,

Ordered, that the time for submitting and settling the bill of exceptions herein and for filing transcript of record herein in the Court of Appeals of the District of Columbia, be and the same hereby is extended to and including the 15th day of October, 1910.

JOB BARNARD, *Justice.*

We consent:
G. L. BAKER,
HUGH H. OBEAR,
Attorneys for Plaintiff.
HAMILTON, COLBERT, YERKES & HAMILTON,
Attorneys for Defendant.

Supreme Court of the District of Columbia.

FRIDAY, *October 14th,* 1910.

Session resumed pursuant to adjournment, Hon. Job Barnard, Justice, presiding.

* * * * * * *

The Court having this day signed the Bill of Exceptions heretofore submitted herein, now orders the same of record as of the time of the noting thereof at the trial.

Further upon motion of plaintiff by his attorney and consent of defendant by its attorneys of record, the time within which to file a transcript of the Record herein in the Court of Appeals of the District of Columbia, is hereby extended to and including the 15th day of November, 1910.

11 *Bill of Exceptions.*

Filed Oct. 14, 1910.

* * * * * * *

Be it remembered, that the above-entitled cause came on for hearing on the 23rd day of May, 1910, before Mr. Chief Justice Clabaugh and a jury regularly empaneled to try said cause.

It is thereupon stipulated and agreed by and between counsel for the plaintiff and counsel for the defendant, with the consent of the court, that the following statement of facts should be taken and considered as the evidence in said cause, and be substituted for and in place of the testimony of the various witnesses offered on behalf of the plaintiff.

The plaintiff is the owner of lot 34 in square 693, in the city of Washington, District of Columbia, having a frontage of 20 feet on New Jersey Avenue and an average depth of 81 feet, and improved by premises 415 New Jersey Avenue, Southeast, and has lived with his family in said premises since the 8th day of January, 1908; that he became the owner of said property through his guardian on the 11th day of March, 1901, and thereafter, upon reaching his majority, the said guardian conveyed said property to him on the 22d day of September, 1902. That said property had been occupied by tenants of the plaintiff up to about April 1907, who paid rent therefor at the rate of $30.50 a month, and that from April 1907 to January, 1908, the said property was vacant and unoccupied.

12 That said improvements consist of a three-story and basement brick dwelling house, containing ten rooms, and is situated on the west side of New Jersey Avenue, Southeast, facing in an easterly direction, and that the rear windows on all the floors of said house open in the direction of the railroad tracks leading from the tunnel of said defendant. That between the right of way covered by said tracks and the property of the plaintiff are two lots, one having a frontage of 25.42 feet, and the other 19 feet, and improved by two dwelling houses, Nos. 409 and 411 New Jersey Avenue, which have been purchased by the defendant and are now owned by it; and also one other lot having a frontage of 19 feet and an average depth of 116 feet, and improved by a large dwelling house, No. 413 New Jersey Avenue, and owned by one Mary E. Wynkoop; that the nearest portion of the plaintiff's house to the center of the south portal of the tunnel in a straight line across the houses above referred to, is about 114 feet, and the nearest point of the rear end of plaintiff's lot to the center of the tracks, after leaving the tunnel, across the lots before mentioned, is about

90 feet, as shown by a plat hereto attached and made part hereof. That in the rear of the plaintiff's house on the basement floor is a kitchen, on the first floor a dining room and veranda, and on the second floor a bed room and on the third floor a bed room.

That the south portal of the defendant's tunnel opens within and near the northeasterly corner of said square 693, and the tracks leading from the tunnel curve towards the west away from the plaintiff's property, and in a generally southwesterly direc-
13 tion, up an incline or grade from the mouth of the tunnel through the central portion of said Square 693, on to the structure for carrying the elevated tracks over and beyond South Capitol Street. That the northeasterly corner of said Square 693 is at the junction of New Jersey Avenue and D Street, Southeast, and the tunnel extends from its said mouth or portal in a northeasterly direction, under the Capitol, and Library grounds and First Street, Northeast, to the Union Station at Massachusetts Avenue.

There are two sets of railroad tracks in the tunnel and leading from it. That there were several houses built upon and near the said northeasterly corner of said square 693, at or about the point where the mouth or portal of the tunnel and said tracks are now located, which were torn down by the defendant or its agents, for the purpose of the construction of said tunnel and tracks, which said houses and the lots upon which they stood, were first acquired by the defendant by purchase or condemnation. That said tunnel and the tracks located therein and leading therefrom through the center of Square 693, are used for the passage of trains both north and south, and that about thirty trains pass over said tracks and through said tunnel in the course of each day. That all of said trains are passenger trains, with the exception of an occasional shifting engine, and that said trains frequently pass in and out of said tunnel without stopping, but said trains also very often stop at or near a switching tower situated near the center of said Square 693.

That the plaintiff's property has been damaged by the volumes of dense, black or gray smoke *o*mitted from said trains, also
14 dust and dirt, cinders and gases emitted from said trains while passing in or out of said tunnel or standing on said tracks near said signal tower. That there is a fanning system installed in said tunnel which causes the gases and smoke emitted from engines while in said tunnel to be forced out of the south portal, which said gases and smoke contaminate the air, and also add to the inconvenience suffered by plaintiff in the occupation of his property. That while said house was pleasant and comfortable for purposes of occupation before the construction of said tunnel and tracks, since the said tunnel and tracks have been in use and operation the said property has not only depreciated in value, but the tenant removed therefrom, and the plaintiff was obliged to occupy the house himself by reason of his inability to rent the same.

That said property at the time it was purchased by the plaintiff was worth about $5,500, while now it is only worth about $3,000. That the rental value of said property has depreciated from the same cause from $30.00 per month to $20.00 per month. That the per-

sonal property of the plaintiff in said house, consisting of furniture, bric-a brac and other personal belongings, was worth, before the conditions complained of existed, about $1200, while now they are worth not more than $600, all of which depreciation in value is due to the presence of smoke, cinders and gases emitted from trains passing on said tracks and emitted from the mouth of said tunnel, which smoke, cinders and gases enter the dwelling of said plaintiff and settle upon the furniture and other personal property therein contained, contaminates the air and render said house objectionable as a habitation. That said dwelling house has also been dam-
15 aged by vibrations caused by the movement of trains on said tracks or in said tunnel, resulting in the cracking of the walls and wall paper and breaking glass in windows, and disturbing the peace and slumber of the occupants thereof.

That the defendant, the Washington Terminal Company is the owner of said tunnel and the tracks therein, but that its ownership of tracks ceases at the south portal of said tunnel. That the tracks extending from the south portal of said tunnel in a southwesterly direction through Square 693 are owned by the Philadelphia, Baltimore and Washington Railroad Company and said tracks and said tunnel are used by the trains of the Philadelphia, Baltimore and Washington Railroad Company, the Chesapeake and Ohio Railway Company, the Southern Railway Company and the Washington Southern Railway Company; but the movement of said trains is controlled by the defendant Terminal Company; that said tunnel and the tracks leading from the south portal thereof, across said Square 693, were located, constructed, and are maintained under the authority of acts of Congress of February 12, 1901, and February 28, 1903, in accordance with plans and specifications approved by said acts.

That no claim is made by the plaintiff that said tunnel and said tracks in Square 693, and all trains operated therein and thereon, were constructed, operated or maintained in a negligent manner; and that said tunnel and said tracks were built upon property acquired by purchase or in condemnation proceedings, and that they were constructed under authority of the acts of Congress and permits issued by the Commissioners of the District of Columbia as aforesaid.

16 This was all the evidence offered on behalf of plaintiff, and upon the case as thus made out, the defendant, by its counsel, moved the court to instruct the jury under the pleadings and all the evidence to return a verdict for the defendant, and after argument and consideration of said motion, the court announced the following decision:

"Gentlemen, I have given this question the best consideration I can. It is a very important one. I do not feel the slightest responsibility in the matter, however. Ordinarily the court does feel, when it undertakes to decide any question, that there is more or less responsibility, if the parties are not able to take the case to a higher court and have the question decided. I have already been

notified in this case that no matter which way it may be decided it will go to the Court of Appeals and ultimately to the Supreme Court, and I therefore feel very much relieved. I do not feel that any serious harm will be done to either side which ever way I may decide it. It is always a great comfort to be informed of that fact in advance, for it saves the court a great deal of time and trouble and anxiety.

The authorities that have been relied on by the defendant in this case have been cited for the purpose of establishing, in limine, that the defendant in this case was directed and ordered by Congress to put its tracks in a given place and the tunnel at a given point; that they have done so in accordance with the direction of this act, and, as a result, it has affected the property of some one who is not an owner of adjoining property to that of the defendant company.

The question here is do the authorities that have been
17 presented to the Court support that contention? Counsel for the defendant has very thoroughly, and, as it seems to me, frankly differentiated the authorities which he thinks support the contention in this case, that is the authority of the case decided by Judge McComas, the name of which I forget and the case decided by Judge Morris, and the Fifth Baptist Church case in the Supreme Court of the United States.

It is a little singular that in the Wynkoop case, where the question was directly presented to the lower court that the Court of Appeals, while it sustained the lower court, sustained it upon an entirely different principle from that upon which the case was decided. There was no kinship even between the decision of the Court of Appeals and that of the lower court, and therefore, if one can judge from that fact, it would rather be an authority the other way. It was easy for them to have met the direct statement of the lower court; but they did not. They decided it upon an absolutely different principle, as counsel for the plaintiff very frankly and fairly admit.

In the case of the railroad which has been cited the company shut off the ingress and egress of a person who lived alongside of the road. The company not merely changed the grade by its action, but they absolutely prevented the party from getting in or out of that property, and the court said "Of course, you cannot do that," and allowed damages resulting from that fact. In that case the property was absolutely and directly injured by reason of the fact

that the railroad company using a street or public highway
18 could not possibly close out an adjoining property holder from the right to get into and out of his own property.

The Fifth Baptist Church case has also been distinguished by defendant's counsel. There, the railroad company was authorized, by act of Congress, to locate certain buildings within certain given lines, and they chose to put their round house adjoining the property of the Fifth Baptist Church. In consequence of that, the results were harmful to the church property. The Supreme Court, there held, with that state of facts before them, that inasmuch as the railroad company chose to put the roundhouse right

alongside of the church it would have to take the consequences, if it did any harm to that church, which was an adjoining property holder. It seems to have been construed as meaning that by other courts. You will remember, that in the case cited from Lawyers' Reports Annotated, one of the courts drew attention to the fact that evidently that was the basis of the decision in the Fifth Baptist Church case.

It seems here is a case in which the railroad company has no choice. Unless they wanted to surrender their charter-rights, they were compelled to obey the mandate of Congress. Congress said to the company "You shall do this;" and there is no question but that they must either do it or surrender their charter-rights, from the necessity of the case.

The railroad company builds in accordance with what Congress says it must do. It is compulsory. I assume, without knowing anything about it, that the property directly adjacent was purchased and settled for. I do not know anything about that, but I
19 make the suggestion to show what in my judgment, is the difference between the two cases. Certain it is that a railroad corporation has no right to take the property of anybody without paying for it, and no one will contend for a moment that it can be otherwise.

But does it follow that, because somebody else is injured in a consequential way by reason of the fact that the railroad company, in the operation of its trains, which are matters of necessity—because people cannot do without trains any more than trains can do without people—does it follow that because in the operation of its tracks it injures somebody who may be two squares away from the road, the railroad company is liable. If they can be responsible for injury done to a man whose property is 80 feet away they can be just as responsible, upon principle, if it is 800 feet away, provided injury is done.

That is the question presented. It does not seem to me that it could possibly follow. While I do not think this decision in 153rd United States is absolutely in point, after an examination of it; yet I still think that the inference to be drawn from it is very much in point, and it governs my views in this case.

That is plainly a case in which the Supreme Court of the United States was asked to construe the opinion of the Supreme Court of Pennsylvania, which is based upon the constitutionality of certain proceedings brought under the Constitution of the State of Pennsylvania. Of course that court would not go contrary to the construction put by the State court on its own State Constitution and State laws, unless there is something in the case which contravenes the Constitution of the United States.

20 If the contention made here be true in point of law, then it would apply in that case just as well as it does here, because the facts are almost analogous. The act of the Pennsylvania Railroad Company was, in my judgment, just as unconstitutional as the act in this case, if it be unconstitutional at all. I cannot differentiate between the facts. I take it that when that case came to the Supreme

Court of the United States, and in the opinion of the justice delivering the opinion is the statement that one of the questions involved is the taking of private property without compensation, that was one of the questions before the court, the other question being that already stated by counsel.

I ought to say that, in the Marchant case, as counsel very well understand, when the Pennsylvania Railroad built that freight station they ran their elevated trains to the station. In order to build that elevated station they were compelled to buy and did buy all of the property on the south side of Filbert Street, which runs parallel with the elevated structure. After doing that, they built their railroad upon their own property. They built this elevated structure upon their own property on the south side of Filbert Street, with the exception that, in a certain portion of it, they go out into the middle of the street and get upon the property of some other property holder.

Those property holders, by reason of the elevated structure being there, could not get out of their houses. They were practically shut off and the court said "Of course you are entitled to recover because they have prevented you, an abutting property owner, from
21 the use of your house; you cannot get in or out." That is one class of cases spoken of here.

In the other class of cases, however, the elevated structure was not out in the street; but it was built upon the property of the railroad company, and the street was between it and the property of the plaintiff.

In the Marchant case, suit was brought for exactly the same that is sued for here. That is, he said that because of the fact that the houses were shaken by the running of trains and by this movement of their engines, and by the dust and smoke and whatnot, which considerably decreased the value of the property, the company was liable. In this case it was not an abutting property holder, but the street separated them.

In the case at bar it is contended that is taking the property of the plaintiff without just compensation, and therefore in violation of the Constitution of the United States.

In the Marchant case it was contended that it was taking property without just compensation and therefore in violation of the Constitution of the United States.

I cannot differentiate the cases. It is perfectly impossible for me to do it.

The other question before the court was that it was a taking of property without due process of law. I want to get the exact language of the court there. The court said "The plaintiff in error further contends that by the proceedings in the courts of Pennsylvania she was denied the equal protection of the law."

The third point was that the property was taken without
22 just compensation and consequently was taken without due process of law and that she was denied the equal protection of the law. So those are the three points decided.

The Supreme Court held that the Supreme Court of Pennsylvania

had decided in accordance with the law. That is the effect of this decision. Now, if the property was taken without just compensation surely the Supreme Court of the United States could not have said that it was not a federal question. They could not have said "You can take this property without just compensation," when all the facts and circumstances of the case appeared upon the record.

The court says, in talking about the equal protection of the law, "Conceding, for the sake of the argument, that the facts are as alleged by the plaintiff in error, we are unable to see any merit in the contention that the Supreme Court of Pennsylvania, in distinguishing between the case of those who like Duncan, were shut off from access to and the use of the street by the construction thereon of the elevated railroad, and the case of those who suffered, not from the construction of the railroad on the street on which their property abutted, but from the injuries consequential on the operation of the railroad, as situated on defendant's own property, thereby deprives the plaintiff of the equal protection of the law. The two classes of complainants differed in the critical particular that one class suffered direct and immediate damage from the construction of the railroad in such a way as to exclude them from the use of their accustomed highway, and the other class suffered damages which were consequential on the use of the defendant company of their franchise on their own property."

23 So that it seems to me, following out the principal there announced, that if the railroad company runs its train on its road without negligence—and in this case it is conceded that there can be no proof of negligent user of their road on the part of the defendant company the company is not liable. This property not being abutting property, but being removed from the railroad tracks and not directly affected, it does not seem to me it can be held that you can recover against the company when some one perhaps two or three squares away is affected by smoke, dust, noise and so forth, when the company was compelled to use that particular way. That seems to me to be different from a case where they have deliberately so used their property as to affect the value of an adjoining property owner.

I do not think the case presented by the plaintiff in this case entitles him to a recovery."

Thereupon the court granted the motion of the defendant, and instructed the jury to return a verdict for the defendant, which was accordingly done. To the granting of which motion by the court, the plaintiff, by his counsel, then and there excepted, and said exception was duly noted upon the minutes of the court before the jury rendered its verdict, and the plaintiff prays the court to sign and seal this his bill of Exceptions, which is accordingly done this 14th day of October, 1910, Now for Then.

HARRY M. CLABAUGH,
Chief Justice.

24 *Directions to Clerk for Preparation of Transcript of Record.*

Filed Oct. 18, 1910.

* * * * * * *

The Clerk in preparing the transcript of record will embody the following:

1. The plaintiff's declaration.
2. The defendant's pleas.
3. The plaintiff's amendment to declaration.
4. Stipulation as to pleas to amended declaration.
5. The plaintiff's joinder in issue.
6. Memo.: Verdict of jury.
7. Judgment on verdict; appeal noted and bond fixed.
8. Memo.: Bond filed and approved.
9. Order July 10, 1910, extending time for settling bill of exceptions and filing transcript of record.
10. Order August 15, 1910, extending time for settling bill of exceptions and filing transcript of record.
11. Order making bill of exceptions part of the record.
12. Bill of exceptions.
13. Order of October 14, 1910, extending time for filing transcript of record.
14. This designation of record on appeal.

G. L. BAKER.
HUGH H. OBEAR.

25 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 24, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 51446 at Law, wherein A. Webster Richards is Plaintiff and Washington Terminal Company, a corporation, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 10th day of November, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2248. A. Webster Richards, appellant, vs. Washington Terminal Company, a corporation. Court of Appeals, District of Columbia. Filed Nov. 10, 1910. Henry W. Hodges, clerk.